No. 98-536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOMMY OLMSTEAD, Commissioner, *et al.*,
Petitioners,

v.

L.C. and E.W., each by JONATHAN ZIMRING
as guardian ad litem and next friend,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

BRIEF *AMICI CURIAE* FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE NATIONAL ALLIANCE FOR THE MENTALLY ILL SUPPORTING RESPONDENTS

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INTEREST OF AMICI

The American Psychiatric Association (APA), with more than 40,000 members, is the Nation's largest organization of physicians specializing in psychiatry.[1] It has participated in numerous cases in this Court. *See, e.g., Kansas*

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1 Letters from the parties consenting to the filing of this brief have been filed with the Clerk. *See* Sup. Ct. R. 37.3. No person except *amici* and their counsel contributed to the writing of this brief or made a monetary contribution toward its preparation or submission. *See* Sup. Ct. R. 37.6.

v. Hendricks, 521 U.S. 346 (1997); *Jaffee v. Redmond,* 518 U.S. 1 (1996); *City of Edmonds v. Oxford House, Inc.,* 514 U.S. 725 (1995); *Youngberg v. Romeo,* 457 U.S. 307 (1982). The APA seeks in this case, as in others, to ensure that state decisions about the care and treatment of persons with mental illness or other disabilities properly serve the individuals' best interests—here, by not unjustifiably depriving individuals of the benefits of integration into community settings when such settings are appropriate for them.

The National Alliance for the Mentally Ill (NAMI), with more than 200,000 members and 1,200 state and local affiliates, is the Nation's leading grassroots advocacy organization dedicated exclusively to improving the lives of persons with severe mental illnesses, including schizophrenia, bipolar disorder (manic-depressive illness), major depression, obsessive-compulsive disorder, and severe anxiety disorders. NAMI seeks in this case to ensure that people with severe mental illnesses are not unnecessarily denied opportunities to enjoy the benefits of living safely and successfully in the community, when they are able to do so, and receive the treatment required to enable them to live in the most integrated settings appropriate to their needs.

STATEMENT

A. Statutory Framework

The issue in this case is best understoood in light of the provisions and structure of the Americans with Disabilities Act of 1990 (the ADA), 42 U.S.C. § 12101 *et seq.*, as a whole. Congress began the ADA with express findings and then set forth prohibitions against discrimination in employment (Title I), public services (Title II), and public accommodations (Title III). The statute as a whole is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination

against individuals with disabilities" (§ 12101(b)) and to work significant changes across a wide range of private and public practices. *See generally* H.R. Rep. 485, Part III, 101st Cong., 2d Sess. 28-34 (1990); H.R. Rep. 485, Part III, 101st Cong., 2d Sess. 23-26 (1990) (26: "The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation."); S. Rep. 116, 101st Cong., 1st Sess. (1989).

Findings. Several of Congress's findings speak directly to isolation of individuals with disabilities from the ordinary community settings that people generally take for granted. Congress's very first finding after noting the number of Americans with disabilities was that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities, continue to be a serious and pervasive social problem." § 12101(a)(2). Other findings repeat and expand on this recognition that unnecessary isolation and segregation are a "form[] of discrimination." Congress included "segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities" in a list of "various forms of discrimination." § 12101(a)(5). Congress declared that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." § 12101(a)(8). Congress added that "unfair and unnecessary discrimination and prejudice denies . . . the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." § 12101(a)(9).

Employment. Title I of the ADA addresses employment. §§ 12111-12117. It defines "qualified individual

with a disability" based on the ability to perform "the essential functions" of the job. § 12111(8). The definition adds that "consideration shall be given to the employer's judgment as to what functions of a job are essential." § 12111(8).

The basic rule of Title I is a ban on "discrimination" in employment. § 12112(a). The statute then itemizes what discrimination "includes." § 12112(b). Practices that "segregat[e] . . . in a way that adversely affects the opportunities or status of . . . [an] employee because of the disability" are included. § 12112(b)(1). Also included are refusals to make "reasonable accommodations" that would impose no "undue hardship" (§ 12112(b)(5)(A)), a standard that is defined to mean "significant difficulty or expense, when considered in light of" a number of factors, focused on but not limited to cost considerations (§ 12111(10)). In a similar vein, the Act adds a defense for certain employment standards if they are "job-related and consistent with business necessity," subject to a "reasonable accommodation" limitation. § 12113(a). The Equal Employment Opportunity Commission is authorized and directed to "issue regulations . . . to carry out" Title I. § 12116.

Public Services. Title II of the ADA applies to "public services" furnished by governmental entities. §§ 12131-12165. In addition to a host of provisions governing transportation services (§§ 12141-12165), Title II sets forth four generally applicable provisions (§§ 12131-12134). These provisions apply to any "public entity," which includes a "State or local government" as a whole, as well as particular departments or agencies. § 12131(1).

The core term, "qualified individual with a disability," is based on "meet[ing] the essential eligibility require-

ments for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2). The basic anti-discrimination rule, then, is that, "[s]ubject to the provisions of [Title II], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." § 12132. After applying the remedy provisions of 29 U.S.C. § 794a—the Rehabilitation Act—to this prohibition (§ 12133), Title II directs the Attorney General to "promulgate regulations . . . that implement" the prohibition (§ 12134(a)), specifying that (except for three designated areas) the regulations shall not only be consistent with the ADA as a whole but also with the so-called "coordination regulations" promulgated by the Department of Health, Education, and Welfare on January 13, 1978, under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. § 12134(b).[2]

Acting pursuant to that directive, the Attorney General has promulgated regulations stating: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d); *see* Pet. Br. App. 13a-14a. The regulations further provide that a public entity must make "reasonable modifications" to its practices to avoid discrimination "unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); Pet. Br. App. 13a. The Attorney General explained, upon promulgating these regulations, that they were "intended to pro-

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2 The "coordination regulations" that the Act refers to, as they were promulgated in January 1978, are printed as an appendix to Petitioners' Brief. Pet. Br. App. 1a-5a.

hibit exclusion and segregation of individuals with disabilities," that "[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act" because "[p]rovision of segregated accommodations and services relegates persons with disabilities to second-class status," and that, "in most instances, separate programs for individuals with disabilities will not be permitted." Pet. Br. App. 17a-18a (emphases added by petitioners omitted).

Public Accommodations. Title III of the ADA governs public accommodations offered by private entities. §§ 12181-12189. After defining key terms such as "public accommodations" (§ 12181), Title III states a general rule that no one "shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ." § 12182(a). The next subsection, entitled "construction," then lays out a series of standards giving specific meaning to the bar on discrimination. § 12182(b).

The "construction" subsection first designates a number of actions or inactions that "shall be discriminatory," including "denial of the opportunity . . . to participate in or benefit from" a defendant's goods, services, etc.; affording such an opportunity to an individual with a disability "that is not equal to that afforded to other individuals"; and providing a good, service, etc. "that is different or separate from that provided to other individuals, unless such action is necessary" to ensure a comparably effective benefit. § 12182(b)(1)(A). Reinforcing and extending the foregoing presumption against separateness, the same subsection specifies that goods, services, etc. "shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual" (§ 12182(b)(1)(B)) and that, even if a separate

program is justified, the opportunity to participate in the program that is "not separate or different" may not be denied (§ 12182(b)(1)(C)). The subsection then adds several "specific prohibitions," the broadest of which mirrors Title I's reasonable-accommodation provision by stating that "discrimination includes" several kinds of inaction:

> failure "to make reasonable modifications" when "necessary to afford" goods, services, etc. to individuals with disabilities, unless the defendant "can demonstrate that making such modifications would fundamentally alter the nature of such goods, services," etc.;
>
> failure "to take steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the [defendant] can demonstrate that taking such steps would fundamentally alter the nature of the good, service, [etc.] being offered or would result in an undue burden";
>
> failure "to remove [certain] barriers . . . in existing facilities . . . [or] vehicles . . . where such removal is readily achievable" and, otherwise, "to make such goods, services, [etc.] available through alternative methods if such methods are readily achievable."

§ 12182(b)(2)(A)(ii)-(v).[3]

B. This Litigation

L.C. has mild to moderate mental retardation and schizophrenia; E.W. has mild retardation and borderline per-

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[3] Title IV of the ADA contains a number of miscellaneous provisions, including Section 12201(a), which states that, except as otherwise provided, the ADA applies no "lesser standard than the standards applied under" the Rehabilitation Act of 1973, 29 U.S.C. § 790 *et seq.*

sonality disorder. *See* Pet. App. 32a-33a; Pet. Br. 8. At different times, both women were admitted to the Georgia Regional Hospital-Atlanta. Pet. Br. 8. In 1995, L.C. brought suit alleging an entitlement under the ADA to be provided her State-provided "habilitation" and treatment services in a community rather than institutional setting, and E.W. intervened. Pet. App. 32a-33a.

While the case was still in the district court, L.C. was given a community placement; and while the case was in the court of appeals, so too was E.W. *See* Pet. Br. 9, 11. Except for the period surrounding needed surgery for kidney problems in E.W.'s case (Pet. Br. 11), it was accepted by the State below, and the State's professional treatment teams determined, that existing community programs constituted, at a minimum, appropriate placements for both L.C. and E.W. *See* Pet. Br. 9-11; Pet. App. 36a ("[t]here is . . . no dispute that plaintiffs can be placed in the community"; "defendants have already placed L.C. in a community-based program"; "the qualified experts are unanimous in their opinion that E.W. *can* be placed in the community, and defendants concede that E.W. qualifies for community-based services" (footnote discussing surgery omitted)); *id.* at 38a-39a ("there is no dispute that defendants already have existing programs providing community services to persons such as plaintiffs"). On that basis, the district court granted summary judgment to L.C. and E.W., holding that they were entitled under the ADA and the Attorney General's implementing regulations to placement in appropriate community settings. *Id.* at 39a.

The court of appeals, in the main, affirmed. Pet. App. 1a-30a. It held: "where, as here, the evidence is clear that all the experts agree that, at a given time, the patient could be treated in a more integrated setting, the ADA

mandates that it do so at that time unless placing that individual would constitute a fundamental alteration in the state's provision of services." *Id.* at 24a; *see id.* at 25a ("the State's own professionals agreed that E.W. could be placed in a less segregated setting"). The court immediately added: "Nothing in the ADA, however, forbids a state from moving a patient back to an institutionalized treatment setting, as the patient's condition necessitates." *Id.* at 24a.

The court of appeals also explained that the demonstrated authority of the State to transfer both its own funds and Medicaid funds between institutional and community settings presumptively made a community setting a "reasonable" accommodation. *Id.* at 26a. Nevertheless, while mere invocation of funding limits cannot justify the continued unnecessary institutionalization, the State has available a defense of "fundamental alteration." *Id.* at 25a-26a. The court remanded the case for the district court to consider the defense, instructing: "Unless the State can prove that requiring it to make these additional expenditures would be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service it provides, the ADA requires the State to make these additional expenditures." *Id.* at 29a.[4]

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the ADA is reasonably interpreted and applied, as it has been by the Attorney General pursuant to a broad grant of implementing authority, to mean that an individual with a disability who is being provided government services is

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[4] As described below, the district court, on remand from the Eleventh Circuit decision, subsequently rejected the defense in this case.

entitled to be provided those services in a community setting if such a setting is an appropriate one for the individual, subject to a defense that the result would be a "fundamental alteration" of the government services. That principle finds its easiest application in the present case. The State's own professionals determined that community settings were appropriate ones for L.C. and E.W., and existing community-based programs were available to serve them.

Contrary to petitioners' core statutory contention, the fundamental discrimination bar of Title II (§ 12132) is not restricted to *intra*-"program" or *intra*-"service" discrimination, but is reasonably read to bar the State as a whole from demanding that persons with disabilities unjustifiably make an important sacrifice, as a condition of receiving government services, when that sacrifice is not required of other, non-disabled recipients of government services (even different services). The statutory bar applies by its terms to "any public entity," including (under the express definition, § 12131(2)) the State itself; it forbids disparate access to (collectively) "the services, programs, or activities" of the State, not any particular service, program, or activity; and it also broadly bars the State itself (a public entity) from any "discrimination." § 12132. The statutory language thus is not limited to discrimination within the confines of a particular "program" or "service." Moreover, rejection of such an approach not only advances the basic statutory policy, given that the interests at stake here are so vital, but also serves a strong interest in avoiding artificial and dispute-breeding line-drawing about where one "program" stops and another starts. Nothing in the pre-ADA background against which Congress enacted the ADA precludes this reasonable reading of the statute.

Once the focus is reasonably placed on the State as a whole, the substantive discrimination principle is straight-

forward; depriving an individual with a disability of the benefits of community integration, unless such a community setting is inappropriate for the individual, is a form of discrimination (where other recipients of government services need not sacrifice their interests in community integration). The ADA, reflecting a decades-long trend toward reducing institutional populations, makes overwhelmingly clear the congressional determination of the importance of the interests that are damaged, for many individuals with disabilities, by separation from their communities. To be sure, and of great importance, institutional settings are in the best interests of other individuals, and denial of such settings in those situations would work opposite damage. But unless a community setting is inappropriate for a particular individual, as determined according to professional judgment, denial of such setting is discriminatory. In this case, the State's own professionals found community settings appropriate, so there is no occasion to set a standard for review of contrary determinations by a government's professionals.

There is also no occasion, and it would be premature, to explore the exact contours of the "fundamental alteration" defense to an otherwise-valid claim of unlawful discrimination. That defense is consistent with the ADA, and its availability, along with the "qualified individual with a disability" precondition to a claim, necessarily moderates the impact of, and confirms the reasonableness of, the presumptive integration rule at issue here. But the defense was not applied in the ruling before this Court, and its application properly awaits exploration in the lower courts of what real-world effects—possibly cost *savings*—will be produced by the rule. The court of appeals' adoption of the Attorney General's presumptive integration rule should therefore be affirmed.

ARGUMENT

The Attorney General, construing the regulations adopted pursuant to express implementing authority, has concluded that community integration is required as long as it is appropriate for an individual (as it undisputedly is here), subject to a defense based on "fundamental alteration." The Attorney General is due deference not only in construing her own regulations (see *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 95 (1995); *Martin v. OSHRC*, 499 U.S. 144, 151 (1991)) but in construing the ADA (*Bragdon v. Abbott*, 118 S. Ct. 2196, 2209 (1998)). *Cf. Auer v. Robbins*, 117 S. Ct. 905, 912 (1997) (deference where there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question"). As long as the mandate is understood not to deprive individuals of institutional services when such services are needed, and the determination of appropriateness reflects professional judgment, which is all that this case presents, the Attorney General's position is a reasonable and therefore valid construction and application of the ADA.

I. The Americans With Disabilities Act Is Reasonably Applied To Preclude Discrimination By The State As A Whole, Not Just Individual "Programs" Or "Services," In The Conditions Attached To Receipt Of Government Services

Petitioners' principal contention is that Title II of the ADA is limited to *intra*-program or *intra*-service discrimination, so that, as long as a program or service that is limited to persons with disabilities does not unjustifiably exclude or deny its benefits to other qualified persons with disabilities, Title II is automatically satisfied. Pet. Br. 19-21. There are strong reasons for rejecting this contention based on the statutory directive to the Attorney

General to promulgate regulations consistent with the Act as a whole and with the pre-existing "coordination" regulations. Quite apart from any such basis, however, petitioners' view that the Attorney General's construction is impermissible under the ADA should be rejected on the basis of the fundamental statutory prohibition set forth in Section 12132.

A. Reading Section 12132 to bar discrimination only by a particular agency *within* the confines of a particular "program" or "service" is neither required nor perhaps even natural. Instead, the provision is readily read to apply to the State as a whole and to bar discrimination by the government in its overall provision of services. Most strikingly, the proscription expressly applies to "*any* public entity," which is defined to include the "State" itself. It is not just particular agencies, or their programs, that are covered by the prohibition.

An intra-program or intra-service limitation cannot be discerned from other aspects of the statutory language either. Even the initial proscription on exclusion from or denial of the benefits of "the services, programs, or activities of a public entity" is not written in terms of each particular program or service considered separately, but refers generically to a public entity's "services, programs, or activities" in the plural. § 12132. And in any event, the availability of a broader non-program-specific construction is made clear by the catchall phrase that concludes the provision, which directly bars "discrimination by any such entity" without mention of, or limitation to, any "services, programs, or activities." § 12132.

The discrimination bar, of course, applies only to a "qualified individual with a disability," which requires that the individual "meet[] the essential eligibility requirements

for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2). That precondition sets limits on who may claim discrimination: only persons—like respondents in this case—who meet the "essential" eligibility requirements of services provided by the State. But this precondition does not serve the distinct function of then defining what constitutes discrimination. In particular, it does not specify that the comparison class, for purposes of determining whether individuals with a disability are unjustifiably being treated worse than individuals without, is always restricted to persons eligible for a specific program. The precondition of a "qualified individual with a disability," accordingly, does not immunize from Section 12132 scrutiny all unjustified differences in treatment between two groups of persons receiving government services (although not the same service).

Petitioners' insistence on a service-by-service or program-by-program application of Section 12132 thus hardly follows from the statutory language, which readily admits a broader perspective consistent with the comprehensive congressional policy and findings. Most simply, if persons with a disability must unjustifiably sacrifice important interests as the price of receiving a government service, while other persons need not make a sacrifice, there is "discrimination" between groups of "similarly situated" persons (Pet. Br. 21) because of disability. For that reason alone, Section 12132 is (presumptively) violated. It also makes sense, given the broad congressional aims, to conclude, under the first part of the section, that such differential treatment is a forbidden denial of the full intended benefits of, and access to, the government's services, when the sacrifice required is unnecessary. Regardless, the proper inquiry under Section 12132 is simply whether the required sacrifice is justified.

This reading is not just textually sound. In selecting the level of specificity at which to apply the statute's anti-discrimination bar, both the fundamental policy of the Act and practical interests in workable application and administration may rightly play a large role. *See* Pet. Br. 20 (whether an interpretation is "administratively awkward" is a negative consideration in statutory construction); *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 275 (1995) (construing statute not only to promote "basic purpose" of law but to avoid "unnecessarily complicating the law and breeding litigation"); *Cedar Rapids Community School Dist. v. Garret F.*, No. 96-1793 (Mar. 3, 1999), slip op. at 9 ("workable interpretation"). Given that the ADA applies sweepingly to government services of almost every stripe, different judgments about the balance of relevant considerations may well be warranted from context to context or issue to issue. Indeed, Congress indicated the need for context-sensitive choices in carrying out the ADA by enacting a classically broad authorization for executive implementation (§ 12134), the usual means for working out the application of broad principles to diverse circumstances in a complex world. *See, e.g., AT&T Corp. v. Iowa Utilities Bd.,* 119 S. Ct. 721, 730 n.6, 733 n.10 (1999).

For the particular issue presented here, both fundamental statutory policy and a strong practicability consideration support a rule broadly forbidding unjustified segregation. As discussed below, ending unjustified separation of persons with disabilities from the life of the community at large, and thus reducing the wounding stigma often associated with such separation, is basic to the aims of the ADA. That policy does not easily accommodate an artificial limitation of the discrimination bar to the confines of particular agency "programs" or "services."

In addition, the Attorney General's general presumptive integration mandate is supported by a reasonable assessment of the serious workability difficulties with petitioners' proposed alternative of a "service"- or "program"-specific perspective. There is nothing self-evident or easy about defining what is the precise "service" or "program" to be used for purposes of determining, as petitioners would require, whether that service or program is being provided in a discriminatory fashion. This case illustrates the difficulty, because Georgia has been providing care for mentally retarded and mentally ill individuals in both community and institutional settings. Does Georgia have one overall service or program or several separate programs? Petitioners' view makes the applicability of Section 12132 turn on the answer to such questions. Given the large measure of arbitrariness involved, it is eminently reasonable to reject the effort to delineate the boundaries of a "service" or "program," at every governmental level in every State, at the threshold of the ADA analysis, at least when the interest at stake is so fundamental to individuals and to the Act. In this circumstance, there is nothing unreasonable about concluding that the line-drawing game is not worth the candle and, instead, applying the anti-discrimination principle to the government entity as a whole.

B. This construction of Section 12132 is in no way precluded by arguments to the effect that Congress, in enacting the ADA, ratified a clear contrary pre-ADA interpretation—either of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), or of the "coordination" regulations on which the Attorney General modeled the ADA regulations. For one thing, Congress was not re-enacting a pre-existing statute, but writing a new one with a new

context and a new agency "delegation." Moreover, Congress used broadened language in the ADA, omitting Section 504's limitation to discrimination "solely" by reason of the disability; set forth detailed findings about and definitions of discrimination; and made a far more sweeping commitment to reform of public treatment of persons with disabilities than it ever had done before. In addition, the demanding premise for any such preclusion—a settled clear meaning or an "unwavering line" of authority (*Bragdon,* 118 S. Ct. at 2208; *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 531-32 (1994))—is lacking.

In particular, petitioners include a string citation of various lower court decisions under Section 504. *See* Pet. Br. 26. Their very failure to lay out precisely what those decisions held confirms their limited import. As the court of appeals below explained (Pet. App. 19a-20a), those decisions, while rejecting various claims under Section 504 (including demands for the provision of new government services), do not constitute anything like the clear line of construction-limiting authority that would rule out a reading of the ADA, with its consciously comprehensive findings and policies, as reaching cross-program discrimination (or, more narrowly, a presumptive integration requirement). Moreover, the language of the pre-ADA "coordination" regulations (Pet. Br. App. 1a-5a) readily can support such a construction, and petitioners themselves indicate (Pet. Br. 28-29) that there was no judicial construction of those regulations, limiting them to intra-program or intra-service discrimination, that Congress might have ratified.

Petitioners also mistakenly rely on a statement of this Court in *Traynor v. Turnage,* 485 U.S. 535, 549-50 (1988), to support their limited, intra-program view of

the ADA. *See* Pet. Br. 23. In the relied-on passage, *Traynor* says only that Section 504 imposes no blanket requirement "that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." 485 U.S. at 549. This case involves no such asserted requirement of universal extension to all persons with disabilities of all services provided to some persons with disabilities—an assertion that would have to confront the "qualified individual with a disability" precondition that is plainly satisfied here (§ 12131(2)). Rather, unlike *Traynor*, where no handicapped individual was treated worse than any non-handicapped individual, this case involves a core claim of discrimination between persons with disabilities and persons without: the former, to receive critical government services, must sacrifice the important life benefits and opportunities of community integration, while the latter need not. There is no basis for concluding that Congress decisively approved such discrimination, foreclosing an otherwise-reasonable construction of the statutory language under the broad authority it granted to the Attorney General to implement a statute intended to have transformative effects on public and private action alike.

II. Depriving An Individual Of The Important Benefits Of Community Integration, Unless Such A Setting Is Inappropriate For The Individual According To Reasonable Professional Judgment, Is Discrimination Under The ADA.

The Attorney General's presumptive integration mandate rests on a simple proposition. A State's deprivation of the benefits of community living, imposed as a condition for a person with a disability to receive a service from the public entity, when not justified by the needs of that individual, is prohibited discrimination (whenever, as will virtually always be the case, other individuals with-

out a disability who are receiving other government services are not subject to the same deprivation as a condition of receiving government services). As long as that principle is applied with the recognition that institutional settings *are* appropriate for some individuals, and with reliance on professional judgment in making the appropriateness determination, it is an unimpeachable implementation of the ADA.

A. The principle at issue is amply supported in the statute. Congress made express findings recognizing that isolation from community settings may be a "form[] of discrimination." § 12101(a)(2). It included "segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities" in a list of "various forms of discrimination." § 12101(a)(5). It declared that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals" (§ 12101(a)(8)) and that "unfair and unnecessary discrimination and prejudice denies . . . the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous" (§ 12101(a)(9)). Living in a community setting is for most people essential to pursuit of a full range of life opportunities and to "full participation, independent living, and economic self-sufficiency." These findings, applicable to the ADA as a whole, properly inform the construction and implementation of the simple, general bar on discrimination in Title II (§ 12132) and support the Attorney General's presumptive integration mandate.

So, too, do the indications of what constitutes discrimination found elsewhere in the ADA, which, indeed, the Attorney General is guided to respect in promulgating regulations (§ 12134(b)). Title I, governing employ-

ment, treats as discrimination practices that "segregat[e] . . . in a way that adversely affects the opportunities or status of . . . [an] employee because of the disability." § 12112(b)(1). Title III, governing public accommodations, presumes discrimination when a service "is different or separate from that provided to other individuals, unless such action is necessary" to ensure comparable "effective-[ness]" (§ 12182(b)(1)(A)) and specifies that goods, services, etc. "shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual" (§ 12182(a)(1)(B)). *See also* § 12182(b)(1)(C) (even if separate program justified, opportunity to participate in the program that is "not separate or different" may not be denied). Those congressional declarations of policy elsewhere in the Act reinforce the reasonableness of the presumptive integration mandate adopted by the Attorney General under Title II.

B. These statutory indications reflect the familiar history of State-operated institutions for the care and treatment of persons with mental illness or retardation. Institutions in their origins were often noble in aim and design. *See, e.g.*, Pet. Br. 3-5. But by the time Congress enacted the ADA in 1990, it had plainly come to favor the provision of mental-health and mental-retardation services in settings as integrated as possible, given the needs of the individuals involved.

The congressional determination reflects at least two important judgments about the price involved in institutional settings for individuals who can handle and benefit from community settings. One is the judgment, familiar in the context of racial segregation, that a powerful stigma often attaches to those who are separated from society—even when the separation is "only" the price of receiving services that, for the individual, are practicably unavoidable. *See* H.R. Rep. 485, Part II, at 41-43; H.R. Rep.

485, Part III, at 26. The other is the common-sense judgment that isolation from community settings can have far-reaching effects in curtailing the life opportunities of individuals—including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. For individuals able to manage the process, the ability to choose exposure to the world of opportunities that depend on community integration is invaluable. Indeed, in mental-health terms, the enhancement of such manageable opportunities is near the core of what treatment and "habilitation" are fundamentally designed to achieve.

These judgments are reflected in the strong national consensus and trend over the last two decades to provide services for persons with mental illness or retardation increasingly in community settings and decreasingly in institutional settings. *See*, *e.g.*, Pet. Br. 6-8; *Amicus* Br. for National Conf. Of State Legislatures 3-4, 10-11.[5] Medically, the advent of new psychiatric medications beginning in the 1950s contributed centrally to making possible this dramatic change. *See* P. Appelbaum, *Almost A Revolution: Mental Health Law and the Limits of Change* 50 (1994). Financial and governmental commitment to providing the needed community services lagged behind, contributing often to neglect and homelessness. *See* P. Appelbaum, *supra*, at 51; E.F. Torrey, *Nowhere to Go:*

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[5] Since the mid-1950s, the total number of people with mental illnesses in state psychiatric hospitals throughout the United States has been reduced by 85 percent. According to E. Fuller Torrey, a prominent research psychiatrist, there were, in 1955, 558,239 patients with severe mental illness in the nation's public psychiatric hospitals. By 1994, this number had been reduced to 71,619 persons. When adjusted to the growth in total population of the United States during this period, the actual decrease in the numbers of people with severe mental illnesses in public psychiatric hospitals between 1955 and 1994 was 92 percent. E.F. Torrey, *Out of the Shadows: Confronting America's Mental Illness Crisis* 8-9 (1997).

The Tragic Odyssey of the Homeless Mentally Ill (1988); R.J. Isaac & V.C. Armat, *Madness in the Streets: How Psychiatry and the Law Abandoned the Mentally Ill* (1990). But in recent years, various changes in federal as well as state policies have increasingly supported community-based services. *See* Pet. App. 26a; Pet. Br. 30-31. Today, the widespread recognition of the importance of community integration, both in avoiding stigma that is often attached to separation and in providing the fullest possible range of life opportunities and experiences, is undeniable.

C. To say that the opportunity for community integration is generally an important personal and social good is not, of course, to say that it is the right result for everyone at all times. Some individuals, whether mentally retarded or mentally ill, are not prepared at particular times —perhaps in the short run, perhaps in the long run—for the risks and exposure of the less protective environment of community settings. *See Amicus* Br. of Voice of the Retarded 3-4, 7-8 ("This Court may safely assume that all disabled welcome the maximum liberty which their condition permits. The difference is medical: not all disabilities permit community placement."); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985) (footnote omitted) (noting wide variation in circumstances of mentally retarded). For such individuals, at such times, an institutional setting may be the best environment for care and treatment, often (though not always) for a temporary period leading to re-integration into community life. To be sure, advances in antipsychotic medications and in treatment programs have meant that most individuals who previously were institutionalized can be treated in community settings—as long, that is, as necessary services are in fact provided in that setting. For

others, however, institutional settings are needed and must remain available.[6]

Accordingly, an extreme position in either direction can be cruel and harmful to the individuals whose interests are at stake. On one hand, isolation from the community, when not justified by the individual's needs, is undoubtedly a serious deprivation for the individual—and also reinforces the very discrimination-promoting attitudes that Congress consciously undertook to combat in the ADA. On the other hand, relegation to the exposure of an insufficiently protective environment, when such protection is needed, may be dangerous and destructive for the individual, as well as for society, in turn undercutting the objectives of the ADA. Sweeping global pronouncements are out of place. It is *individuals'* interests that are stake

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[6] *See* R. Munich & W. Sledge, "Treatment Settings: Providing a Continuum of Care for Patients with Schizophrenia or Related Disorders," in G. Gabbard, ed., 1 *Treatments of Psychiatric Disorders* 1075-90 (2d ed. 1995); M.A. Test, "Training in Community Living," in R.P. Lieberman, *Handbook of Psychiatric Rehabilitation* 153-70 (1992); R.J. Isaac & V.C. Armat, *supra*, at 316 ("hospitals play a necessary role in treating mental illnesses"; also reciting research conclusion that hospitals would always have to be available for homicidal, suicidal, or very psychotic patients, citing L. Stein & M.A. Test, "A State Hospital Initiated Community Program," in J. Talbott, ed., *The Chronic Mentally Ill: Treatment, Programs, Systems* 173 (1981)); Lehman, "The Quality of Life of Chronic Patients in a State Hospital and in Community Residences," 37 *Hospital & Community Psychiatry* 901 (1986); Braun *et al.*, "Overview: Deinstitutionalization of Psychiatric Patients, a Critical Review of Outcome Studies," 138 *Am. J. Psychiatry* 736 (1981). We note that institutional settings may not be the only appropriate settings even for individuals needing 24-hour care. *See* Rothbard *et al.*, "Unbundling of State Hospital Services in the Community: The Philadelphia State Hospital Story," 24 *Administration and Policy in Mental Health* 391 (1997); Fenton *et al.*, "Randomized Trial of General Hospital and Residential Alternative Care for Patients with Severe and Persistent Mental Illness," 155 *Am. J. Psychiatry* 516 (1998).

(*cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*")), and individuals' interests and their circumstances vary.

As relevant in the present context, therefore, there is discrimination when an individual with a disability is deprived of a community setting unless such a setting would be contrary to the individual's best interests. That judgment necessarily relies on the professional judgment of those able to assess the individual's needs for care and treatment. There is, however, a natural asymmetry in this standard. If a community setting is *one* appropriate setting, then denial of that setting deprives the individual of vital benefits (without justification in the individual's needs) and must be deemed discriminatory.

D. That standard is met in this case. There is no dispute that community settings are appropriate ones for L.C. and for E.W. That was the judgment of the State's own professionals.

There is, therefore, no need in this case for the Court to confront questions about the degree to which courts, in applying the ADA standard, must scrutinize, evaluate, and if necessary reject an asserted judgment of a public entity's own professionals when disputed by the plaintiff's professionals. Prior to the fundamental policy choice made by Congress in the ADA, this Court both insisted that it was "professional judgment" that mattered and noted some reasons for deference. *Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982). More recently, under the ADA, this Court in *Bragdon* applied a standard of "objective reasonableness," based on objective scientific considerations, in reviewing a professional's judgment of risk. 118 S. Ct. at 2210-11. The proper judicial approach to the issue of appropriateness under the ADA need not be

resolved in this case, because the State's professionals did deem community placements appropriate, so that there was no occasion for judicial second-guessing of the judgment of the State's professionals.

III. The Fundamental Alteration Defense, Whose Concrete Meaning Is Not Ripe For Review, Confirms The Reasonableness Of The General Integration Requirement

This Court should reject the suggestion of petitioners (and the limited number of States that have joined them as *amici*) that the presumptive integration mandate should be rejected because it is too intrusive and perhaps counterproductive. At the outset, such a suggestion does not undermine the threshold conclusion of discrimination: discriminatory deprivation of important benefits does not become nondiscriminatory simply because equal treatment would cost the public entity more money. Nor is it an answer to a charge of discrimination in the provision of a service that the service need not be provided at all or might be withdrawn if it had to be provided equally (an argument that could be made of most government services). *See* Pet. Br. 24. In addition, and in any event, the *in terrorem* argument ignores the important limits incorporated into the construction of the ADA at issue here—limits that confirm the reasonableness of the construction.

One important limit, already noted, is set by the threshold requirement that the plaintiff under Title II be a "qualified individual with a disability." § 12132. That term is defined to require the individual to meet "the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2). The ADA thus does not provide for a general right of any individual with a disability, though not qualified for any existing government programs under their essential eligibility requirements, to

demand that the eligibility criteria be modified so as to create programs suitable for a broader class of individuals.

Closely related, the court below, following the Attorney General's position, has provided for a "fundamental alteration" defense to an otherwise-valid claim of discrimination. That defense comports with the ADA. In Title II, the definition of "qualified individual with a disability" speaks of "*reasonable* modifications" and "*essential* eligibility requirements." § 12131(2). Title I condemns employers' refusals to make "*reasonable* accommodations" and allows a defense of "undue hardship" (§ 12112(b)(5)(A)), a standard that is defined to mean "significant difficulty or expense, when considered in light of" a number of factors, focused on but not limited to cost considerations (§ 12111(10)). Title III similarly condemns the failure of providers of public accommodations "to make *reasonable* modifications" unless the defendant "can demonstrate that making such modifications would *fundamentally alter* the nature of" the provided services. § 12182(b)(2)(A). And the predecessor of the ADA, namely, Section 504 of the Rehabilitation Act, incorporated a similar limitation. *See Southeastern Community College v. Davis,* 442 U.S. 397, 410, 412-13 (1979) ("fundamental alteration"); *Alexander v. Choate,* 469 U.S. 287, 300 (1985). (Emphases added through this paragraph.) While no question is presented here whether this defense is mandated by the ADA, the defense is unquestionably consistent with the ADA.

The availability of such a defense to the presumptive integration mandate under Title II, along with the "qualified individual" precondition, is one among several reasons why petitioners' federalism-based arguments against that mandate lack merit. *See* Pet. Br. 32-35. Quite simply, with this defense, the burdens on public entities are sub-

stantially moderated and can hardly be deemed outside what Congress contemplated. Congress clearly understood that "the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative"—justified by the prospect that "the long-range effects of integration will benefit society as a whole." H.R. Rep. 485, Part III, at 50. Moreover, unlike in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), Congress in the ADA did not merely authorize a "contract" with States under the Spending Power and did not set forth mere aspirational objectives; instead, it clearly imposed an enforceable non-voluntary obligation on the States and other public entities. *Cf. Cedar Rapids,* slip op. 6 (Thomas J., dissenting) ("special rules of construction" apply to Spending Power programs placing "conditions on the receipt of federal funds"). This Court has indicated that, when Congress has thus laid down a broad federal rule that unquestionably displaces state power in an area and granted a federal agency broad authority to implement the command, the proper question is simply whether the exercise of the implementing authority is within the grant, without a special additional federalism hurdle that must be overcome to support its exercise. *City of New York v. FCC*, 486 U.S. 57 (1988); *see AT&T Corp. v. Iowa Utilities Bd.,* 119 S. Ct. at 730 n.6.

A "fundamental alteration" defense, in short, supports the basic rule at issue here. No more need or should be decided about the nature of the defense in this case. The exact nature of the defense has hardly been explored in the lower courts and is not presented at this stage of the present case. Moreover, the nature of the balance contemplated by Congress—between short-term costs and long-term savings, in a statute indisputably ambitious in its

intended effect—is not a matter properly examined in the abstract.

Thus, there are significant factual issues relevant to any elaboration of the standards governing the defense. On one hand, as has been found on remand in the present case,[7] the cost of care or treatment in community settings for particular individuals may often be less than or comparable to costs in institutional settings, either absolutely or for a particular State looking at its own sources of funding (including Medicaid funds).[8] On the other hand, difficult choices may arise if the transfer of individuals leaves high "fixed" costs of needed institutions to be borne in serving a smaller number of individuals, raising their per-person cost "artificially" and creating additional pressure to reduce the availability of institutional settings for those who need them. But discrimination against one

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[7] The district court found, in its January 29, 1999, Order: "There is no dispute that the cost of serving plaintiffs in the community is significantly less than serving them in an institution." Order at 6. The district court added, however, that the State may not actually realize the savings from relocating respondents, "because of fixed overhead costs associated with providing institutional care," and that (on restricted evidence) it was "unable to determine whether the State has realized any appreciable cost savings by placing [respondents] in the community." *Id.* at 6.

[8] *See* Sledge, *et al.*, "Day Hospital/Crisis Respite Care Versus Inpatient Care, Part II: Service Utilization and Costs," 153 *Am. J. Psychiatry* 1074 (1996); Mechanic, "The Challenge of Chronic Mental Illness: A Retrospective and Prospective View," 37 *Hospital and Community Psychiatry* 891 (1986) (history of nursing home transfers); Wasylenki, "The Cost of Schizophrenia," 39 *Canadian J. Psychiatry* 565 (1994); Williams & Dickson, "Economics of Schizophrenia," 40 *Canadian J. Psychiatry* 560 (1995); Stein, "A System Approach to Reducing Relapse in Schizophrenia," 54 *J. Clin. Psychiatry* 7 (1993); Dauwalder, "Cost-Effectiveness Over 10 Years," 30 *Soc. Psychiatry & Psychiatric Epidemiol.* 171 (1995); Miller & Rago, "Fiscal Incentives to Development of Services in the Community," 39 *Hospital & Community Psychiatry* 595 (1988).

individual is hard to justify on the ground that it benefits another individual, and it is, in any event, far from clear what the real-world tradeoffs will be. Not only must more be known about the number of individuals involved in changes that would not otherwise already be taking place, but account must be taken of the possibilities of consolidating facilities, sharing staffs, instituting mixed uses of facilities, and adopting other measures that might materially reduce the costs of change.

Such prospects may make any specter of harmful tradeoffs more hypothetical than real. The nature of the "fundamental alteration" defense should be explored in concrete settings that will inform the proper answer. Meanwhile, the existence of the defense confirms the reasonableness of the presumptive integration mandate applied in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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